

MANDATE

United States v. Polouizzi
09-4594-cr

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

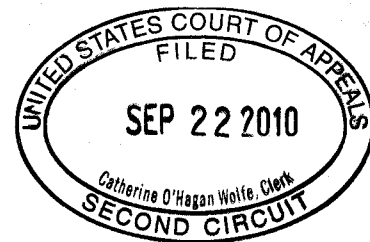
SUMMARY ORDER

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 22nd day of September, two thousand ten.

Present:

ROGER J. MINER,
PIERRE N. LEVAL,
RICHARD C. WESLEY,
Circuit Judges.



UNITED STATES OF AMERICA,

Appellant,

v.

09-4594-cr

PIETRO POLOUIZZI, also known as PETER POLOUICCI,
also known as PETER PIETRO-POLOUICCI, also known
as PETER POLIZZI,

Defendant-Appellee.

MANDATE ISSUED ON 11/22/2010

1 For Appellant: PETER A. NORLING, Assistant United States Attorney (Allen
2 L. Bode, Assistant United States Attorney, *on the brief*), for
3 Loretta E. Lynch, United States Attorney for the Eastern
4 District of New York, Brooklyn, New York
5

6 For Defendant-Appellee: PETER GOLDBERGER (Pamela A. Wilk, *on the brief*)
7 Ardmore, Pennsylvania. Mitchell J. Dinnerstein, of counsel,
8 New York, New York.
9

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11 Appeal from the United States District Court for the Eastern District of New York
12 (Weinstein, J.).
13

14 **UPON DUE CONSIDERATION**, it is hereby **ORDERED, ADJUDGED**, and
15 **DECREED** that the order of the district court granting a new trial be **VACATED** and the matter
16 **REMANDED** to the district court for further proceedings consistent with this order.

17 The government appeals from the district court's order vacating the judgment of
18 conviction entered against defendant-appellee Pietro Polouizzi on the possession counts under 18
19 U.S.C. § 2252(a)(4)(B), and ordering new trial on both the possession counts and the receipt
20 counts. In the prior appeal, we ruled that possession of multiple images of child pornography at
21 the same time and place may not properly be charged as multiple counts – as opposed to a single
22 count of illegal possession – and similarly that receipt of multiple images of child pornography in
23 a single transaction may not be charged as multiple violations of 18 U.S.C. § 2252(a)(2). *United*
24 *States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009). The government contends that it was not within
25 the lawful exercise of the district court's discretion to vacate the jury's findings of guilt and order
26 new trial solely because of our ruling that the original charge was multiplicitous and could not
27 justify multiple convictions. We agree, especially in view of the fact that the evidence on the

1 retrial anticipated by the district court would have been “essentially the same” as the evidence in
2 the previous trial. *United States v. Polouizzi*, 687 F. Supp.2d 133, 159 (E.D.N.Y. 2010). There
3 is no reasonable basis in these circumstances to conclude that the presentation of the same
4 evidence in the context of the more numerous counts adversely affected the jury’s appraisal of
5 the defense of insanity. Courts must exercise their authority under Rule 33 to set aside a jury
6 verdict and grant a new trial “sparingly and in the most extraordinary circumstances.” *United*
7 *States v. Cote*, 544 F.3d 88, 101 (2d Cir. 2008) (internal quotation marks omitted).

8 *United States v. Ketchum*, 320 F.2d 3 (2d Cir. 1963), is not to the contrary. The question
9 considered in that case was whether an election among multiplicitous counts might be required in
10 an appropriate case “either before or after the close of the evidence.” *Id.* at 8. The opinion made
11 no suggestion that multiplicity, raised by the defendant for the first time on appeal after
12 conviction, might justify a grant of a new trial.

13 The order of retrial is reversed. We remand for reinstatement of the jury’s verdict on no
14 more than four counts of receipt in violation of 18 U.S.C. § 2252(a)(2) – one for each date on
15 which the defendant received images – and on one count of possession in violation of 18 U.S.C.
16 § 2252(a)(4)(B), all in accordance with our prior ruling, and for imposition of sentence. The
17 government’s application for a writ of mandamus prohibiting the district court from instructing
18 the jury concerning the mandatory minimum sentence for violations of 18 U.S.C. § 2252(a)(2)
19 is moot in light of the fact that there will be no retrial. In the event of a subsequent appeal, the
20 matter will be assigned to this panel.

21 **VACATED AND REMANDED.**

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FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK


Catherine O'Hagan Wolfe

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


Catherine O'Hagan Wolfe